Owens-Brockway Plastic Products, Inc. *and* International Chemical Workers Union, AFL–CIO, Local No. 728. Case 9–CA–26872

May 28, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On June 15, 1990, Administrative Law Judge David L. Evans issued the attached decision. The Respondent filed exceptions and a supporting brief.

On June 14, 1991, the National Labor Relations Board issued *Dubuque Packing Co.*,[1] in which it announced a new test for analyzing the issue presented in this case: whether an employer's decision to relocate unit work is a mandatory subject of bargaining. On September 30, 1991, the Board afforded the parties in this case an opportunity to submit statements of position in light of the Board's decision in *Dubuque Packing*. The Respondent, the General Counsel, and the Charging Party filed position statements.

Thereafter, on December 31, 1991, the Board remanded this proceeding to Judge Evans to reopen the record for the limited purpose of receiving evidence, in light of the test articulated in *Dubuque Packing* and discussed infra, concerning whether the Union could have offered concessions that could have changed the Respondent's decision to relocate unit work.

On April 21, 1992, Judge Evans issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision, supplemental decision, and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions as set forth below and to adopt the recommended Order.

I. INTRODUCTION

The single issue presented in this case is whether the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union concerning the decision to close its Jeffersonville, Indiana manufacturing plant and permanently relocate to its other plants work previously performed at Jeffersonville. We find, under the test set forth in *Dubuque Packing*, that the Respondent did so violate the Act.

II. FACTUAL BACKGROUND

The Respondent owns 26 manufacturing plants engaged in the production of plastic containers and bottles. The Respondent was formed as the result of a merger in April 1988 of Brockway Plastics, Inc., which owned 9 plastic bottle plants including the Jeffersonville plant, and Owens-Illinois Corporation, which owned 17 plastic bottle plants. The Respondent is an incorporated division of Owens-Illinois Corporation (Owens-Illinois).

The Union has been the collective-bargaining representative of the production and maintenance employees at the Jeffersonville plant since it opened in 1962. When the April 1988 merger occurred, the Respondent assumed the collective-bargaining agreement effective from July 19, 1985, to July 18, 1988. On July 19, 1988, the parties signed a 1-year extension of that contract.

The Jeffersonville plant operates principally as an ''overflow'' facility for the Respondent's other manufacturing plants. Thus, Jeffersonville fills manufacturing orders that exceed the capacity of the Respondent's other plants. Despite its status as principally an overflow plant, in early January 1989,[2] the Respondent was preparing to bid on an account that could be performed by the Jeffersonville plant. The Jeffersonville plant had recently lost a bid on another account. The failure to secure the latter account and the desire to bid successfully on the former account spurred Dale Leidy, vice president in charge of manufacturing and engineering for the plastic products division of Owens-Illinois, to meet with the Jeffersonville employees and the Union's business committee concerning Jeffersonville's competitive position. Leidy explained that competition was fierce, production costs were high at Jeffersonville, and that corporatewide cost-cutting measures were being taken. Leidy further explained that the Respondent could be more aggressive in the bid for the upcoming contract if ''there's reason to believe that we can lower our costs.''

A. *The Respondent Informs the Union of the Need for Concessions at Jeffersonville*

On January 5, the Respondent requested to meet with the Union concerning contract language, wages, and benefits. The Union agreed, although the parties' contract did not expire until July 19. Accordingly, the parties met on January 10, February 28, and March 9, in what were deemed ''informational meetings.''

At the January 10 meeting, the Respondent presented the Union with a document outlining the steps needed ''to improve the competitive situation of the Jeffersonville business.'' The document in part provided: ''Revision in the wage rate schedule that will provide for labor costs that are more in line with the marketplace competition.'' The Respondent additionally presented various proposed contract modifications,

[1] 303 NLRB 386.

[2] All dates are in 1989, unless otherwise noted.

including a wage reduction proposal and restrictions on the use of seniority rules. The Respondent also presented the Union with a chart showing that the wage rates at Jeffersonville were much higher than that of the Respondent's other plants. Indeed, the Jeffersonville plant had the highest average hourly wage rate of all the Respondent's manufacturing facilities.

The Respondent repeated its need for concessions at the February 28 informational session. At the March 9 informational meeting, the Respondent presented the Union with a document showing that the production costs at Jeffersonville were higher than that of its competitors in the industry. The document concludes:

> 8% GROSS PROFIT, 1% NET PROFIT BASED ON CURRENT JEFFERSONVILLE COSTS CONCLUSION—WE CANNOT COMPETE ON THIS BUSINESS

The judge found that the Respondent emphasized to the Union at the informational meetings that concessions were necessary for the Jeffersonville plant to remain viable. The judge found further that the Respondent informed the Union that it could not guarantee that Jeffersonville would remain open even if concessions were granted, although it had no intention of closing the plant.

B. *The Formal Contract Negotiations*

On June 21, the parties met for formal negotiations of a contract to succeed the contract due to expire July 19. The Union proposed a substantial wage increase. It is uncontested that the Respondent's negotiators were very upset at the Union's failure to respond to the request for concessions emphasized by the Respondent throughout the informal negotiation period.

The parties met again on July 10, 11, and 17. At these sessions, the Respondent continued to demand concessions regarding wages and the seniority provisions of the collective-bargaining agreement. The Union refused to agree to concessions and continued its demand for a wage increase.

On July 18, the Respondent presented its final proposal, which called for dropping of the demands of both the Union and the Respondent, a 2-percent (40 hours' pay) lump-sum payment to all unit employees, and a 1-year extension of the expiring contract. The Union accepted the proposal, and the contract immediately went into effect.

C. *The Respondent Closes the Jeffersonville Plant and Relocates Its Operations*

On August 29, Leidy announced to the Jeffersonville in-plant union committee that the plant would close effective October 28. Leidy, reading from a prepared statement, announced that ''[t]he decision to permanently close this plant was based on a general weakening of customer orders in the Midwest coupled with the anticipation of major customer conversions to materials that will transfer significant orders to our competitors in other geographic markets.''

On August 30, the Union requested bargaining with the Respondent over the decision to close and its effects. The Respondent declined to bargain concerning the decision to close, but agreed to effects bargaining.[3] The Respondent also notified the Union that the decision to close Jeffersonville did not turn on labor costs, and that the decision to close the plant was made on August 27.[4]

The Jeffersonville plant ceased production in early September. The plant closed in late October. The Jeffersonville plant had 10 manufacturing machines; following closure, 4 machines were transferred to the Respondent's Louisville, Kentucky plant; 2 to its Florence, Kentucky plant; 2 to its Harrisonburg, Virginia plant; and 2 to the Respondent's research facility in Toledo, Ohio. Production orders that formerly were filled at Jeffersonville were after its closure filled at the Respondent's plants in Louisville and Florence, Kentucky, and Chicago and Vandalia, Illinois.

III. DISCUSSION

At the outset, we reject the Respondent's contention that its decision with respect to the Jeffersonville plant was exempt from mandatory bargaining under *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981). It is undisputed that the Respondent did not decide to terminate all the production that occurred at the Jeffersonville plant, but rather decided to transfer work to different locations where it would be performed by other employees. Accordingly, we find that the Respondent's decision is properly classified as a relocation decision governed by our *Dubuque Packing* decision, rather than a partial closing decision governed by the Supreme Court's *First National Maintenance* decision.

In *Dubuque Packing*, we announced the following test for determining whether an employer's relocation decision is a mandatory subject of bargaining:

> Initially, the burden is on the General Counsel to establish that the employer's decision involved a relocation of unit work unaccompanied by a basic change in the nature of the employer's operation. If the General Counsel successfully carries his burden in this regard, he will have established prima facie that the employer's relocation decision is a mandatory subject of bargaining. At this juncture, the employer may produce evidence rebutting the prima facie case by establishing that

[3] There is no complaint allegation that the Respondent unlawfully refused to engage in effects bargaining.

[4] The judge inadvertently stated at sec. II,A,3, par. 10 of his decision that Leidy testified that the decision to close Jeffersonville was made on July 28.

> the work performed at the new location varies significantly from the work performed at the former plant, establishing that the work performed at the former plant is to be discontinued entirely and not moved to the new location, or establishing that the employer's decision involves a change in the scope and direction of the enterprise. Alternatively, the employer may proffer a defense to show by a preponderance of the evidence: (1) that labor costs (direct and/or indirect) were not a factor in the decision or (2) that even if labor costs were a factor in the decision, the union could not have offered labor cost concessions that could have changed the employer's decision to relocate.

Id. at 391.

Citing, inter alia, the 1988 merger between Brockway Plastics, Inc. and Owens-Illinois, the Respondent argues that the General Counsel did not satisfy his initial burden under *Dubuque Packing* of establishing that the Respondent's relocation decision was ''unaccompanied by a basic change in the nature of the employer's operation.'' We disagree. The General Counsel has shown that the Respondent's decision to close the Jeffersonville plant and relocate the work performed there was a separate and distinct company decision that did not alter the basic nature of the Respondent's operation as a manufacturer of plastic bottles and containers. The General Counsel has therefore established a prima facie case that the decision involved here is a mandatory subject of bargaining giving rise to an obligation to bargain.

Under *Dubuque Packing*, the burden now shifts to the Respondent to produce evidence rebutting the General Counsel's prima facie case by establishing, inter alia, that its decision to relocate unit work involved a change in the scope and direction of the Respondent's enterprise. Alternatively, the Respondent may proffer a defense to show by a preponderance of the evidence that (1) labor costs were not a factor in the decision to relocate or (2) that even if labor costs were a factor, the Union could not have offered labor cost concessions that could have changed the decision to relocate. The Respondent alleges a change in scope and direction of its enterprise, as well as a defense based on labor costs. We shall consider each of these contentions in turn.

A. *Did the Decision to Relocate Unit Work Involve a Change in the Scope and Direction of the Respondent's Enterprise?*

The Respondent first argues that its decision to relocate unit work away from the Jeffersonville plant was part of a corporatewide consolidation or reorganization plan resulting from the Brockway-Owens-Illinois merger in April 1988. The Respondent accordingly contends that its consolidation or reorganization plan—assertedly encompassing the relocation of unit work away from the Jeffersonville plant and the resulting closure of that plant—establishes a change in the scope and direction of its enterprise sufficient to rebut the General Counsel's prima facie case under *Dubuque Packing*. We disagree. We have carefully reviewed the evidence presented by the Respondent and find that the Respondent has not shown that it formulated a consolidation plan that called for the relocation of unit work away from the Jeffersonville plant.[5]

The Respondent did not introduce any evidence to show that prior to, or at the time of, the April 1988 merger its directors or managers contemplated a consolidation of production facilities of the type the Respondent now alleges is exemplified by the transfer of unit work away from Jeffersonville and the resulting closure of that plant. Indeed, the record reveals that Dale Leidy, vice president in charge of manufacturing and engineering for the Owens-Illinois plastic products division, turned his attention to an evaluation of the productivity of the various plants for the first time in late 1988 or early 1989—many months after the merger occurred. Although Leidy described this evaluation as the second part of his ''strategy'' to accommodate the new facilities obtained in the merger, the Respondent never established even that this ''strategy'' was part of a corporatewide plan to consolidate operations arising from the merger.

The evidence presented by the Respondent does not establish that, as a result of his evaluation, Leidy made a determination—contingent, tentative, or otherwise—to relocate work away from the Jeffersonville plant and to close it, or to take similar relocation action resulting in closure at any other plant, as part of a corporatewide reorganization plan. On the contrary, in June 1989, Leidy led a working group which evaluated the performance of the Jeffersonville facility and recommended to ''CONTINUE TO OPERATE JEFFERSONVILLE AT LEAST THROUGH 1989.'' That recommendation recognized that labor costs at Jeffersonville were high and proposed seeking a reduction in them, but the recommendation did not make the continued operation of the plant ''AT LEAST THROUGH 1989'' contingent on any later event, much less on a reorganization plan. Indeed, the June recommendation does not even mention the existence of any consolidation or reorganization plan nor that such a plan might result in a subsequent decision to relocate unit work away from Jeffersonville and to close that plant.[6]

[5] Thus, we do not decide today that a plant relocation coming some 18 months after a significant merger or consolidation can never be viewed as part of that merger or consolidation.

[6] We note that the Respondent also evaluated three of its other production facilities—Louisville, Florence, and Vandalia—at the time it evaluated the Jeffersonville facility in June. None of these

Continued

Nor has the Respondent shown that the decision at issue otherwise involved a change in the scope and direction of the enterprise. No doubt a work relocation decision may be so substantial that it can be termed a change in the scope and direction of the business. But there also may be work reassignment decisions that result in relatively insignificant changes in a company's operations. See, e.g., *Holmes & Narver*, 309 NLRB 146 (1992). The Respondent here has presented evidence which at best establishes a decision of the latter variety. The Jeffersonville plant was the only plant of 26 that was closed during the first 2 years after the merger. The machines at Jeffersonville were not sold, but were transferred to other plants in September-October 1989. The Respondent did not introduce evidence to show that it intended those machines to remain idle but rather the record suggests that the Respondent intended to utilize those machines for production at its other plants. The Respondent did not change its method of production; the type of extrusion blow molding machine used at Jeffersonville continued to be used at its production facilities elsewhere. It continued to manufacture at other plants the same type of products it had produced at Jeffersonville.

We thus find that the Respondent has failed to present evidence establishing that its decision to relocate work away from Jeffersonville in August 1989 was a planned result of the merger, or that the relocation decision otherwise involved a change in the scope and direction of its enterprise.

B. *The Respondent's Labor Cost Defense*

We reject, as did the judge, the Respondent's contention that labor costs were not a factor in its decision to relocate the bargaining unit work performed at the Jeffersonville plant. Commencing with the informal negotiating session in January and continuing through the formal contract negotiations in mid-July—approximately 1 month prior to the decision to close Jeffersonville—the Respondent underscored the need for wage concessions in order for the Jeffersonville plant to remain viable. The Respondent's emphasis on wage concessions is well documented in the judge's decision and highlighted in the factual background section of this decision. Indeed, the Respondent described the Jeffersonville plant, in an internal memorandum dated June 23 entitled, ''Jeffersonville Negotiations Update,'' as ''an operation whose future is extremely uncertain without concessionary demands made by the company being met.'' The Respondent's persistent course of conduct prior to closure stressing the need for wage concessions at Jeffersonville compels the conclusion that labor costs were a factor in its decision to relocate the Jeffersonville operations.

The Respondent further contends that even assuming that labor costs were a factor in its decision, the Union could not have offered labor cost concessions that could have changed the Respondent's decision to relocate, because there was insufficient business at the Jeffersonville plant to cover that plant's operating costs. As the Respondent argues in its brief, ''even if the Union had agreed to work for minimum wage, [the] Respondent still would have been forced to close the plant because it did not have sufficient business to cover its fixed costs.''[7]

In support of this argument, the Respondent presented monthly production charts for its manufacturing plants assertedly showing that only 2 of the 10 machines at Jeffersonville were in operation at the time the decision to relocate was made in late August. Vice President Leidy testified that six machines need to be in operation at Jeffersonville for that plant to operate at a profit. The Respondent accordingly argues that due to the decline in its business at Jeffersonville—to well below the level necessary even to meet its fixed costs—the Union could not have offered any labor cost concessions that could have changed the decision to relocate.

The Respondent further submits that its merger in 1988 and concomitant expansion to 26 plants caused a significant decrease in production at the Jeffersonville plant. Following the merger, many accounts formerly manufactured at Jeffersonville were transferred to newly acquired plants located closer to the Respondent's customers. This permitted the Respondent to provide better customer service, and to decrease freight and delivery costs which are customarily paid by the customer in the Respondent's industry. For example, the Respondent transferred its substantial Jergens account from Jeffersonville to its Cincinnati plant beginning in January 1989, because Jergens is located in Cincinnati. The Respondent submitted documentary evidence demonstrating such interplant transfers which occurred following the April 1988 merger, much of it transferring work away from Jeffersonville.

We have carefully reviewed the documentary evidence submitted by the Respondent to support its contention that any amount of labor cost concessions offered by the Union could not have changed its decision to relocate work away from Jeffersonville. As set forth below, we find that a preponderance of the evidence does not support the Respondent's principal contention that, at the time the relocation decision was made, its business at the Jeffersonville plant was substantially less than that necessary to cover the fixed costs of operating the plant, and far less than that necessary to operate at a profit. We accordingly conclude below that the Respondent has not satisfied its burden under

three evaluations mentions the existence of a corporatewide reorganization plan.

[7] The Respondent identified these fixed costs as the building lease, insurance, taxes, and depreciation.

Dubuque Packing of showing that the Union here could not have offered labor cost concessions that could have changed the Employer's decision to relocate the bargaining unit work performed at Jeffersonville.[8]

We focus initially on the Respondent's monthly production charts for its manufacturing plants, along with the Respondent's other internal memoranda documenting its own evaluation of the forecast for the Jeffersonville plant during 1989. The Respondent submitted 12 production charts, one dated for each month of calendar year 1989.[9] Each chart shows the number of manufacturing machines in place at each of the Respondent's plants, the number of machines in use at each plant that month, and the number of machines projected to be in use the following month.

The charts dated January through June show all 10 of the Jeffersonville manufacturing machines in operation during that time period. The chart dated June 16 projects seven machines to be in operation the following month.

By memorandum dated May 16 and entitled, ''Jeffersonville Review,'' Leidy notified his colleagues that a meeting would be held on June 14

> to review where we are in plant performance, present plant loading, potential plant loading, etc. We need to understand, from a business point of view, where we are before union negotiations start . . . . The agenda [on June 14] will include: 1. Plant performance year to date . . . . 3. Business outlook for second half . . . . 5. Recommendation-shutdown or extend [contract at Jeffersonville].

At the June 14 meeting, Leidy's working group reviewed a document dated June 13 entitled, ''CONTINUE TO OPERATE JEFFERSONVILLE?'' The document listed various advantages and disadvantages and concluded with the recommendation, as discussed supra, ''CONTINUE TO OPERATE JEFFERSONVILLE AT LEAST THROUGH 1989.'' The working group additionally considered a document showing that the Jeffersonville plant had earned a year-to-date profit in 1989. The document provides:

GROSS PROFIT	
YTD dollars	$920M
YTD %	17.6%

Thus, the working group headed by Leidy was recommending as of June 14 continued operation of the Jeffersonville plant at least through 1989. The recommendation did not intimate that there was a significant danger that Jeffersonville would slide to the point that it would become unprofitable to run the plant only 2 months later. Leidy testified that at the conclusion of the June 14 meeting he transmitted the recommendation of his working group to the Respondent's negotiating team at Jeffersonville.[10]

The monthly production chart dated July 14 shows eight machines in operation at Jeffersonville, with six machines projected to be in operation the following month. The Respondent proposed its 1-year contract extension on July 18, which the Union accepted immediately. The Respondent's extension of the contract for 1 year on July 18, its internal document showing eight machines in operation in July and six projected in August, and the recommendation of Leidy's working group are persuasive evidence that as of July 18 the Respondent believed there was sufficient work to keep Jeffersonville in operation.

Leidy further testified that he was involved in the decision to close Jeffersonville. The Respondent conducted its annual facilities operation review at a corporate retreat on August 14–16. At that meeting, Leidy testified that his superior, Scott Trimble, asked him, ''[W]hat do you think we ought to do at Jeffersonville.'' Leidy replied that ''it looked very bleak, but that he didn't want to give up, and wanted sales to take one more shot at looking at potential business [for Jeffersonville].'' Leidy and Trimble thereafter went on a business trip to Japan. On their return, a meeting was held on August 28 at which Trimble and Leidy were told that no additional business had been found for Jeffersonville.[11] The closure announcement was made on August 29.

Leidy testified, and the Respondent stresses in its brief, that at the time the decision was made on August 27 or 28 to relocate the remaining work at Jeffersonville, only two machines were in operation at Jeffersonville—substantially less than the six machines

[8] We agree with the judge that Leidy's testimony that there was insufficient business at Jeffersonville to operate the plant profitably does not, standing alone, suffice to meet the Respondent's burden under *Dubuque Packing* concerning the issue of labor cost concessions. See 303 NLRB at 393. Our inquiry here focuses on whether the documentary evidence submitted by the Respondent in fact supports Leidy's testimony. We accordingly need not adopt the judge's characterization of Leidy's testimony as false and misleading, but rather determine whether it is supported by the record evidence as a whole.

[9] The 12 charts are dated January 25, February 13, March 10, April 18, May 11, June 16, July 14, August 28, September 15, October 16, November 10, and December 11.

[10] Leidy's testimony also indicates that he remained in contact with the Respondent's negotiating team during the contract negotiations.

[11] As previously noted, the Respondent informed the Union that the decision to close was made on August 27. Leidy testified that the decision was made on August 28. This discrepancy does not affect the result.

necessary to operate Jeffersonville at a profit.[12] In contrast, the Respondent's monthly production chart dated August 28 shows six machines in operation at Jeffersonville.

Two troublesome ambiguities are presented by the Respondent's evidence. First, there is the contradiction just noted regarding the number of machines actually in operation at the time the decision to close was made. Second, the Respondent has not identified what business was lost at Jeffersonville between July 18—when Jeffersonville was operating eight machines and the Respondent entered into a 1-year contract extension—and less than 1 month later on August 14 or 15 when Leidy told his supervisor that the situation at Jeffersonville was ''bleak,'' resulting in the subsequent decision on August 27 or 28 to relocate unit work away from the Jeffersonville plant and to close the plant.

The Respondent attempts to explain the first ambiguity by stating that the monthly production charts refer to the production at the Respondent's plants during the *prior* month. Thus, the Respondent argues that the chart dated September 15, showing two machines in operation at Jeffersonville, actually refers to the situation in August at the time the decision to close was made. Under this theory, the Respondent cautions that its chart dated August 28 refers to its production for the month of July.

The Respondent failed to explain this critical aspect of the production charts when it introduced them into evidence at the initial hearing. Rather, Leidy testified—in equivocal terms—to the retroactivity of the charts at the supplemental hearing.[13] In any event, the Respondent's initial brief submitted to the Board in this case on July 31, 1990—before Leidy's testimony at the supplemental hearing on March 16, 1992—repeatedly cites to the monthly production charts as referring to production as of the date of the chart—not as of the prior month.

For example, the Respondent states at 14 of its brief that ''[i]n May 1989, Respondent was utilizing 99% percent of its shuttle machines (90 out of 91) . . . .'' Indeed, the Respondent's monthly chart dated May 11, 1989, confirms that 90 out of 91 shuttle machines were in use in May, and 99 percent of shuttle capacity was in use. Under the Respondent's theory, however, it should have cited the June 16, 1989 report to reflect production in May. Contrary to the Respondent's contentions in its brief regarding May production at Jeffersonville, the June 16 report shows 87 of 91 machines in use, and 96-percent capacity.[14] These contradictions seriously erode the probative value of the Respondent's documentary and testimonial evidence.

Nor has the Respondent adequately explained what loss of business caused production at Jeffersonville to plunge from eight machines as of the contract renewal on July 18—or even six machines under the Respondent's retroactivity theory—to allegedly two machines 1 month later. The Respondent has identified only its notification in August that it would be losing its large Colgate account 1 year hence. (The Colgate account was primarily filled at the Respondent's Louisville plant but also provided overflow work for Jeffersonville.) The Respondent plainly acknowledges that it knew in August it would maintain the Colgate account for 1 full year, and in fact did so. Accordingly, the loss of the Colgate account does not and cannot account for the decrease in business at Jeffersonville alleged by the Respondent between July and August, because the Colgate business was not lost until one full year later. We are thus unable to identify any loss of business in the critical period between July and August to counter the Respondent's own internal recommendation as of June 14 to ''CONTINUE TO OPERATE JEFFERSONVILLE AT LEAST THROUGH 1989.''[15]

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[12] We note that Leidy testified that in August 1989 Jeffersonville was still profitable for the year.

[13] The following exchange took place during Leidy's cross-examination:

> Q. So that [''CM'' on the monthly production charts] would stand for the number of machines scheduled to be running for that month?
>
> A. Yes. However, normally, these are run a month behind, but—okay. Go ahead.
>
> Q. Well, would this—this dated August 28, is this the one that—the ''CM'' then would be for the number of machines operating during the month of August, is that correct?
>
> A. I think this may well have been the number of machines running in July.
>
> Q. Are you certain of that?
>
> A. That would be my guess, because the one in September—these are made for our operations review. And our operations review for the month of July would come in August.
>
> And so they're made out with the month—the next month here would actually, I believe, be August.
>
> Q. So, ''NM'' would be—so, this is a document prepared on August 28. And you're saying next month would be August 1 through August—the end of August, 1989; is that what you're saying?
>
> A. I believe that is correct. I have not—I think that's correct.
>
> Q. Are you just guessing?
>
> A. This—going back in my memory, looking through the—looking through the numbers, this doesn't agree with my recollection of what the situation was.

[14] Numerous other contradictions may be obtained by comparing the Respondent's citation to its production figures at 14 and 29 of its brief and its monthly production charts.

[15] We note the Respondent's contention that production at Jeffersonville decreased due to the Respondent's transfer of work to its plants more closely located to its customers. The Respondent has failed to specifically identify, however, any such transfer that can account for the precipitous fall in work at Jeffersonville during the critical period between July and August. (As noted, the Respondent identifies solely the loss of the Colgate account.) We observe that, according to the R. Exhs. 23(a) and (b), the transfer of the large Jergens account from Jeffersonville to Cincinnati was accomplished by June.

We accordingly cannot conclude based on this evidence that the Respondent has satisfied its burden of showing, by a preponderance of the evidence, that business was so poor at Jeffersonville at the time the decision to close and relocate unit work was made that the Respondent could not even cover its fixed costs at Jeffersonville, and therefore that no labor cost concessions could have changed its decision.

The Respondent also argues that declining business among its group of seven midwestern plants—which includes Jeffersonville—along with the anticipated loss of the large Colgate account necessitated the closure of one of its midwestern plants to reduce excess capacity in its midwestern group. The Respondent contends that it had sound business reasons for selecting an ''overflow'' plant (Jeffersonville) as the plant to be closed.

The Respondent's general assertions do not satisfy the specific requirements of the *Dubuque Packing* test. Under the second prong of *Dubuque Packing*, the presence or absence of a bargaining obligation depends on whether ''the union could and would offer concessions that approximate, meet, or exceed the anticipated costs or benefits that prompted the relocation decision.'' 303 NLRB at 391. However, despite the opportunity afforded it at the second hearing, the Respondent failed to introduce any evidence indicating how much money it expected to save from the reduction in excess capacity. Having failed to establish in the record the specific cost savings it anticipated from its decision, the Respondent has failed to show that the Union could not have offered labor cost concessions that would have enabled the Respondent to ''approximate, meet, or exceed'' those savings.[16]

C. *The Respondent's Waiver Defense*

We also reject, as did the judge, the Respondent's contention that the Union waived its right to bargain over the decision to close the Jeffersonville plant and to relocate the work performed there. It is well established that waiver of statutory rights must be clear and unmistakable. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). In the circumstances of this case, we cannot find that the Union clearly and unmistakably waived its right to bargain over the decision at issue.

The Respondent contends that the management-rights provision of the parties' collective-bargaining agreement, along with language contained in the preamble to the agreement, permits the Respondent unilaterally to close the Jeffersonville plant and to relocate the work performed there. The Respondent accordingly argues that the Union contractually waived its statutory right to bargain over that subject.

The management-rights clause provides, in pertinent part:

> [I]t is recognized and agreed that the management of the plant and the direction of the working forces is vested in the Employer. Among the rights and responsibilities which shall continue to be vested in the Employer *shall be the right to increase or decrease operation*, the types of products made, methods, processes, and means of production, use and control of plant property, selection of employees for hire, price determination, and other aspects of relationship to customers, to establish such rules as are deemed necessary for the proper and orderly operation of the plant, *remove or install machinery and increase or change production equipment, introduce new and improved productive methods and facilities, relieve employees from duty because of lack of work*, and to discipline or discharge employees for just cause . . . . [Emphasis added.]

The management-rights provision does not specifically address the permanent transfer of production and equipment from the Jeffersonville plant to other facilities. The Respondent accordingly does not and cannot argue that the management-rights clause explicitly grants it unilateral authority to transfer unit work. Rather, the Respondent's position in essence is that its right to increase or decrease operations, remove or install machinery, and relieve employees because of lack of work extends to and encompasses the right to close the plant and transfer production elsewhere.

The critical question is not, however, whether such a right might reasonably be inferred from the management-rights clause; it is whether that interpretation is supported by ''clear and unmistakable language.'' *Universal Security Instruments*, 250 NLRB 661, 662 (1980). The language in the management-rights clause—granting the Respondent unilateral authority with respect to increasing or decreasing operations but without any reference to work relocation—does not meet the clear and unmistakable standard governing the waiver of statutory rights. *Johnson-Bateman Co.*, 295 NLRB 180, 184–185 (1989).[17]

The preamble to the parties' agreement does not constitute a waiver by the Union. The preamble provides:

> This agreement covers the employees and the plant while it and they are in the Jeffersonville

[16] Thus, we have fully considered (and accepted as true) the Respondent's evidence concerning employee layoffs and excess capacity in its midwestern group. As explained above, however, that evidence does not satisfy the specific requirements of the second prong of the *Dubuque Packing* test.

[17] We note that the Respondent has not suggested that the parties' bargaining history demonstrates that the Union ''consciously yielded or clearly and unmistakably waived its interest'' with regard to bargaining about work relocation. *Rockwell International Corp.*, 260 NLRB 1346, 1347 (1982).

> area. This means that if the plant should close down and reopen in this same area, the Agreement would continue to be effective as to the new plant.

The provision's thrust is that if the Jeffersonville plant should close down and reopen in the same vicinity, the parties' contract would continue to apply. Although the provision indeed refers to plant removal, there is nothing in the clause that affirmatively authorizes the Respondent to transfer bargaining unit work outside the unit. A generally worded contractual provision will not be construed as a waiver of statutory bargaining rights. See *Dubuque Packing*, supra at 397.

The Respondent additionally contends that waiver is established by the Union's failure to object to transfers of work from the Jeffersonville plant prior to the summer of 1989. However, the Union's failure to file a grievance claiming that work transfers violated the contract is not tantamount to an acknowledgement that the contract authorized the Respondent to act unilaterally. See *Dubuque Packing*, supra at 397–398. Furthermore, with respect to the Union's alleged failure to request bargaining over prior work transfers, the Board has held that ''[a] union's acquiescence in previous unilateral changes does not operate as a waiver of its right to bargain over such changes for all time.'' *Owens-Corning Fiberglass*, 282 NLRB 609 (1987); *Dubuque Packing*, supra at 397.

IV. CONCLUSION

For all the foregoing reasons, we find that the General Counsel has established a prima facie case that the decision to close the Jeffersonville plant and permanently relocate its work to other plants was a mandatory subject of bargaining and that the Respondent has failed to rebut it or proffer a defense supported by a preponderance of the evidence. Accordingly, we conclude that the Respondent's refusal to bargain over the decision violated Section 8(a)(5) and (1) of the Act.[18]

ORDER[19]

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Owens-Brockway Plastic Products, Inc., Jeffersonville, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[18] Of course, nothing in the Act required that bargaining unit work remain at Jeffersonville. We hold only the Respondent should have bargained with the Union to agreement on bona fide impasse. In negotiations, the Respondent might have achieved the concessions that would have made the relocation unnecessary. Alternatively, the Respondent could have lawfully implemented its decision after bargaining to impasse.

[19] We adopt in its entirety the judge's recommended remedy providing for, inter alia, reinstatement of Jeffersonville employees to positions at the Respondent's other plants where the bargaining unit work has been relocated, and making the employees whole by paying them what they would have earned from the date of their termination to the date of the offer of reinstatement. We leave to the compliance stage of these proceedings whether the closure of any of the plants to which the Jeffersonville work was relocated affects the extent of employee reinstatement and backpay rights under the terms of the remedy in this case.

David L. Ness, Esq., for the General Counsel.
R. Jeffrey Bixler and *Mark E. Curry, Esqs.*, of Toledo, Ohio, for the Respondent.
Alton Priddy, Esq., of Louisville, Kentucky, for the Charging Party.

DECISION

STATEMENT OF THE CASE

DAVID L. EVANS, Administrative Law Judge. This matter under the National Labor Relations Act (the Act) was tried before me on February 27 and 28, 1990, in Louisville, Kentucky. The charge against Owens-Brockway Plastic Products, Inc. (the Respondent) was filed on October 6, 1989,[1] by International Chemical Workers Union, AFL–CIO, Local No. 728 (the Union). The complaint issued on December 5 alleging that, in violation of Section 8(a)(5) of the Act, the Respondent failed and refused to negotiate with the Union ''regarding its decision to close [its] Jeffersonville, Indiana facility and to relocate the operations at said facility to other facilities of Respondent.'' Respondent duly filed an answer admitting jurisdiction but denying the commission of any unfair labor practices.

On the entire record, and my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

During the 12-month period immediately preceding the issuance of the complaint, the Respondent, a corporation, was engaged in the manufacture and sale of plastic bottles and other containers at its Jeffersonville, Indiana facility (the Jeffersonville plant). During that period, in the course of business operations, the Respondent purchased and received at its facility products, goods, and materials valued in excess of $50,000 directly from suppliers located at points outside Indiana. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Facts*

1. History of the Jeffersonville plant

The Jeffersonville plant was constructed in 1961, and it closed in October 1989. During those years the plant was the place of manufacture of plastic containers of various types,

[1] All dates are in 1989 unless otherwise indicated.

mostly bottles for the food and cosmetic industries. In June 1984, Brockway Plastics, Inc. acquired nine plastic container manufacturing plants of IMCO Division of the Ethyl Corporation. One of those plants was the Jeffersonville plant and another was a similar plant in Louisville, Kentucky (the Louisville plant). The Jeffersonville and Louisville plants are about 15 miles apart. In April 1988, Brockway Plastics, Inc. merged with Owens-Illinois Corporation, and Respondent is now an incorporated division of Owens-Illinois. At the time of the merger, Owens-Illinois owned 17 plastic bottle plants, so that there became a total of 26 such plants in the Owens-Illinois system which had 52 total plants. The headquarters of Owens-Illinois is in Toledo.

From 1962, and continuing through the various changes in ownership, the Union was the collective-bargaining representative of the Jeffersonville plant's production and maintenance employees. The last multiyear contract covering the unit employees was between the Union and Brockway Plastics, Inc., effective from July 19, 1985, until July 18, 1988. When the April 1988 merger occurred, Respondent assumed that contract. On July 19, 1988, the parties signed a 1-year extension of the 1985–1988 contract, including a 30-cent across-the-board wage hourly wage increase. As detailed infra, the parties agreed to a second 1-year extension of the 1985–1988 contract on July 18, including a 2-percent (40-hour) ''signing bonus'' to each unit employee, but no other changes.[2]

The 1985–1988 contract, as twice extended, included the following provision at the preamble:

> This agreement covers the employees and the plant while it and they are in the Jeffersonville area. This means that if the plant should close down and reopen in this same area, the Agreement would continue to be effective as to the new plant.

And, at article XIX, ''Management Rights,'' the contract provided:

> Section 1. Subject to the provisions of this Agreement, it is recognized and agreed that the management of the plant and the direction of the working forces is vested in the Employer. Among the rights and responsibilities which shall continue to be vested in the Employer shall be the right to increase or decrease operation [sic], the types of products made, methods, processes, and means of production, use and control of plant property, selection of employees for hire, price determination, and other aspects of relationship to customers, to establish such rules as are deemed necessary for the proper and orderly operation of the plant, remove or install machinery and increase or change production equipment, introduce new and improved productive methods and facilities, relieve employees from duty because of lack of work, and to discipline or discharge employees for just cause; provided that none of such rights shall be exercised in violation of any provision of this Agreement, and further provided that all employees shall receive equal treatment under the application of this clause. Rights not expressly waived by this Agreement shall be retained by the Employer. The listing of specified rights in this Agreement is not intended to be[,] nor shall they be considered restrictive of, or a waiver of[,] any rights of the Employer not listed herein, whether or not such rights have been exercised by the Employer in the past.[3]

The Jeffersonville plant reached an employment complement high of 300 in 1986. There was a steady atrophy, so that at the time the plant closed in 1989, there were only 36 unit employees steadily employed.

2. Negotiations preceding plant closure

Dale Leidy is vice president in charge of manufacturing and engineering for the Plastic Products Division of Owens-Illinois. Leidy reports to Scott Trimble, vice president and general manager of the division.

Leidy testified that, in early January, Kraft Foods was soliciting bids for a contract which could be performed by the Jeffersonville plant, but the Jeffersonville plant would be in competition with the Wisconsin plant of a competitor. The Jeffersonville plant had just lost a bidding war with that competitor over a contract let by a purchaser in Cincinnati. Speaking of the lost contract, Leidy stated:

> and for some reason they were able to make it in Wisconsin and ship it to [the customer in] Cincinnati at a lower price than what we were able to make it in either Florence [Respondent's plant in Florence, Kentucky] or in Jeffersonville. So they [the competitor] wound up with the business [the lost contract], and they were invited to bid on this piece of business [the Kraft contract]. So we knew we had difficulties in being able to effectively compete, and we wanted that [the potential Kraft] business.

For this reason, Leidy testified, he and a group of managers decided to hold meetings with the Union and the Jeffersonville employees.

Leidy and the other managers met during the first week of January with three groups at the Jeffersonville plant: salaried personnel, the Union's business committee, and the bargaining unit employees. Leidy told each group that Respondent had the opportunity to bid for a Kraft Foods contract which would benefit the Jeffersonville plant, but there were problems: the competition was fierce and the costs of production was high at Jeffersonville. Leidy told the groups that management at corporate headquarters in Toledo had cut costs in several areas, including:

> the shutdown of the Kansas City Technical Center, the consolidation of those activities, the number of people that had been cut out in Toledo overall, and that as a way of doing business to be more competitive, that we were taking steps to cut costs in all areas.

Leidy told the groups that ''we've got a limited time to make this happen, and we can be more aggressive in our bid if we think there's reason to believe that we can lower our costs.''

[2] This second extension of the contract was never formally executed by the Union; however, the parties treated the agreement as if it had been executed, and there is no issue that a binding contract was entered on July 18, 1989.

[3] There was no ''Section 2'' of this article.

Leidy was asked and testified on direct examination:

> Q. Now in your presentations, did you say anything about the possibility of the plant closing?
>
> A. I said there was that possibility. I don't remember the exact language.

Gary Boles is Respondent's manager of labor and employees relations. Boles handles contract negotiations and administrative matters for several of Respondent's plants. James Rumpel was an employee of the Jeffersonville plant and president of the Local. On January 5, Boles sent Rumpel a letter stating:

> Our current Labor Agreement remains in effect through July 19, 1989. However, in line with our recent discussions concerning the viability of the Jeffersonville Plant, it is the desire of the Company to immediately initiate discussions with the Union around issues related to Contract language, wages and benefits.

Boles proposed a meeting on January 10. Rumpel immediately replied by letter stating:

> Although you did not specifically request to reopen our current contract, our membership voted unanimously not to do so. However, our membership did give our Committee the authority to meet with you to discuss your concerns. In these discussions we expect [that] you will present documentation to back up your claims made to our members on January 4, 1989.
>
> We look forward to meaningful, honest and frank discussions about our welfare and job security.

The parties did meet on January 10 in what Respondent called an ''informational meeting.'' There were two other of these informational meetings, on February 28 and March 9, before ''formal'' negotiations began on June 21 for renewal of the contract which was to expire on July 19.

John Frechette is the vice president in charge of labor relations for Owens-Illinois. Frechette was Respondent's principal spokesman at the informational meetings and later served as Respondent's principal spokesman in the formal contract renewal negotiations. On direct examination Frechette was asked what prompted the informational meetings. Frechette replied:

> The division felt that the plant was getting itself into a noncompetitive situation relative to the other plants of the Owens-Brockway operation as well as the outside world.

Frechette was assisted by Boles and the Jeffersonville plant manager Norman Lilly. The Union was represented at the informational meetings by Charles Chapman, vice president and International representative of the Union's parent body, Randy Peterson, another International representative, Rumpel, and, at the last informational meeting, several members of the Local's in-plant bargaining committee. Chapman was the Union's principal spokesman.

At the January 10 meeting, Respondent presented the Union with two documents. The first was an untitled five-paragraph listing which Frechette described as ''a very broad outline of the steps needed to increase the flexibility of the Company and to improve the competitive situation of the Jeffersonville business.'' The five paragraphs were:

> 1. Revision in the current concept of job classifications to provide a more flexible approach to getting the work done in a more efficient manner with a higher consciousness toward quality.
>
> 2. Revision in the wage rate schedule that will provide for labor costs that are more in line with the marketplace competition.
>
> 3. Greater emphasis on job training and performance accountability. Qualifications and ability must play a more significant role in assignment decisions than has been the case in the past.
>
> 4. Revise procedures and practices that are not cost effective or are restrictive to an extent that the most efficient manner of performing the work is prevented.
>
> 5. Modify programs that establish cost penalties on the Jefferson Plant that promote additional pay for time not worked.

Frechette also presented the Union with a sheet entitled ''Contract Modifications.'' This document was a proposal to change the 1985–1988 contract, as extended, in several respects including: a requirement that, to receive holiday pay, an employee scheduled to work a holiday must do so; elimination of departmental seniority; restrictions on the use of seniority in bidding, promotions and recall, making, for the first time, ability to perform the job a factor; and consolidation of 11 job specific classifications to 4 general ones, and calling for concomitant wage reductions from 8 cents to $1.07 for the affected employees. Respondent further proposed that the next collective-bargaining agreement expire on July 18, 1991.

Respondent further presented the Union with a chart that compared the wage rates for seven classifications at the Jeffersonville plant with the wage rates for the same classifications at nine other of Respondent's plants. The chart listed the Jeffersonville plant's wages as being much higher than the other plants.

Chapman did not testify. Peterson testified for General Counsel that Frechette presented the above documents stating:

> [T]he Company needed these concessions to become more competitive, that the Jeffersonville plant, the way it stood at this time, could not compete [in] the market because of flexibility, restrictions and the seniority and the cost factor of the plant, what it cost to put the product out.

Peterson testified that Chapman asked if the Union gave Respondent everything it wanted, would they guarantee that the plant would stay open. According to Peterson:

> Mr. Frechette said that it was not the Company's intention to close the plant, that they had no intentions of closing this plant. They wanted this plant to stay open, that they were going to try to get out and bring business into this plant, but he could not give us guarantees on anything.

On direct examination Frechette testified that there was discussion of plant closing, but

> [t]he discussion of the plant closing was simply to the effect that I had no desire or intent as the Company's chief spokesman to close Jeffersonville.

Frechette further testified that when Chapman asked for guarantees that the plant would remain open:

> I told them that there was no way that we could guarantee the future of the plant and the reason for that was that all of the concessions that we had asked for couldn't guarantee [the Jeffersonville plant's remaining open] because the rise and fall of the plant was going to depend upon the market structure and not upon the cost structure of the Jeffersonville plant.

Frechette testified that the Union replied that they did not believe Respondent's figures, that they would not give up their seniority rights, and that, if Respondent could not run the plant at a profit, it should sell it to someone who could.

On cross-examination Boles was asked and testified:

> Q. Now, what happened basically at these [three informational] sessions is, is it not, that the Company told the Union, ''We need some relief on the wages and the work condition issues in the contract in order to remain competitive at Jeffersonville.'' That's what the Company was telling the Union at these discussion meetings, was it not?
>
> A. That's correct.
>
> Q. You were telling—the Company was telling the Union at these meetings that, ''We need concessions on these issues, that it's essential to improve the situation at Jeffersonville, that we get these concessions, isn't that right?''
>
> A. We told them that we felt that it was very necessary in order to be able to attract additional business.
>
> Q. In fact, you told them that it was very necessary to get those concessions for the Jeffersonville plant to remain viable, isn't that right?
>
> A. Words to that effect.

At the January 10 meeting, the Union further asked for information to support Respondent's assertions made at the sessions. Boles testified that some was then given, and some was given later. General Counsel does not contend that, at any point, Respondent unlawfully refused to supply information to the Union.

At the February 28 informational session the Company reiterated its need for concessions and, according to the undisputed testimony of Peterson, Frechette told the Union:

> that it was the most costly plant in the system, that we needed to understand the Company's reasons behind asking for all these things, and . . . Mr. Frechette said, ''You know, the company doesn't have any intention of closing the plant, but that's what we need these things for is to try to keep this plant open, to make it more competitive so it'll be here.''

Boles consistently testified:

> So we did talk about the competitive bid situation; we talked about the viability[4] of the plant, and the improvement that they had shown to that point [in] time, and somewhat rehash the other points that we were looking to achieve some relief in to make the plant more competitive.

On March 1, Boles sent Rumpel a detailed, multipage proposal consistent with the objectives listed in the January 10 presentation.

At the March 9 informational meeting, according to Peterson, Frechette started with ''a little speech'' which included the statement that ''the Company had no desire to close this plant.'' Peterson further remembered that Frechette stated that Jeffersonville was the only 1 of 52 Owens-Illinois plants which did not have ability coupled with seniority rights in procedures for bidding, layoffs, etc., and that Jeffersonville needed to ''get in line'' with the other plants.

Boles testified that at the March 9 meeting, Respondent presented the Union with a document entitled ''Competitive Situation'' and marked ''Confidential.'' The document lists Respondent's production costs at the Jeffersonville plant and compares them with costs incurred by competitors for four different sizes of plastic bottles. Jeffersonville is higher for each size bottle. The memorandum concludes:

> 8% GROSS PROFIT, 1% NET PROFIT BASED ON CURRENT JEFFERSONVILLE COSTS CONCLUSION—**we cannot compete on this business**

The second line is bold faced, as well as capitalized.

Chapman reviewed the figures and, according to the undisputed testimony of Frechette, stated that if Respondent was going to close the Jeffersonville plant, it was going to close the plant, and there was nothing the Union could do about it.

On June 21, the parties met for formal contract renewal negotiations. At that meeting, instead of responding to Respondent's requests for wage and seniority concessions, the Union made many additional demands, including a demand for a ''substantial wage increase'' and a paid lunch period. According to the undenied testimony of Peterson, Frechette became visibly, and audibly, upset, and Frechette made remarks including: ''[H]ere we are trying to get concessions at this plant to make it more competitive, and you're adding more costs to the most costliest plant in the system.'' The meeting ended with no agreements on the concessions that Respondent had demanded.

On July 10, the parties met for a second formal negotiation. Most of the time was consumed with the union representatives' stating that the Union could not understand Respondent's seniority demands and Frechette's responding that the modifications were necessary for efficiency and, again, that Jeffersonville was the only 1 of 52 Owens-Illinois plants that did not consider ability, as well as seniority, in promotions and recall decisions.

The parties met again on July 11. Respondent submitted a proposal that continued to demand economic and seniority concessions, but then sought only a 1-year contract. The Union refused to grant any concessions and persevered in its economic demands, including those for substantial wage increases and a paid lunch period.

The parties met again on July 17. Respondent dropped its demand for a consolidation of classifications, but continued

[4] Tr. 231, L. 19, is corrected to change ''liability'' to ''viability.''

to insist on wage and seniority concessions. The Union's position remained unchanged.

The parties met again on July 18. The Union proposed a 2-year contract with 45-cent across-the-board wage increases in each year, and it made other demands. Respondent presented its ''Final Proposal'' which called for a dropping of all union demands, the dropping of all of Respondent's demands, and the payment of a 2-percent (40 hours' pay) lump-sum payment for all unit employees, and a 1-year extension of the expiring contract.

After a vote by the membership, the union committee accepted this proposal, and the contract immediately went into effect.

Peterson testified that during either the meeting of July 17 or 18, the Union[5] asked if Respondent was going to shut the Jeffersonville plant,

> And the response was either that it's not the Company's intentions to close the plant down, or the Company does not intend to close the plant down, or the company has no desire to close it.

This testimony was not denied; Frechette testified, without contradiction, that Respondent's representatives never told the Union that the Jeffersonville plant would close if the concessions were not granted, and they did not tell the Union that the plant would remain open if the concessions were granted.

3. Announcement of plant closure

On August 29, the in-plant union committee was called to the office to attend a meeting with Plant Manager Lilly, Boles, and Leidy. Leidy read the following announcement to the union committee.

> We are announcing today the Jeffersonville Plant will be permanently closed effective October 28, 1989. This information was provided today to the appropriate international officers of the International Chemical Workers Union, the president of Local 728, the Mayor of Jeffersonville and the state officials required by the Workers Adjustment and Retraining Notifications Act.
>
> We plan to operate two machines until the current job requirements have been completed. It is uncertain at this time, if other customer orders will be available for the Jeffersonville Plant. In any event, all employees actively working will receive regular pay and benefits through the sixty day notice period as required under plant closing legislation, provided employees work until released by the Company.
>
> The decision to permanently close this plant was based on a general weakening of customer orders in the Midwest coupled with the anticipation of major customer conversions to materials that will transfer significant orders to our competitors in other geographic markets. We regret this has happened.
>
> During the next few weeks, we will be meeting with local state employment officials and private employment agencies to discuss job opportunities that may be available in this area. Information will be provided as it becomes available.
>
> . . . .
>
> Questions about specific details can be directed to Norm Lilly.

The committee tried to ask several questions; Leidy refused to answer them, but Boles did tell the committee that, if they put their questions in writing, he would answer them.

On August 30, Peterson sent Boles a list of questions about the plant closing, and Peterson further demanded the opportunity to bargain over the decision and its effects. Boles replied:

> I am responding to your letter of August 20, 1989. As we discussed in our telephone conversation of September 15, 1989, we are prepared to meet with you to bargain concerning the effects of the closing of the Jeffersonville plant on the employees you represent. We look forward to our meeting with you on September 22, 1989 to begin this process.
>
> The Company finds itself in the unfavorable position of not having sufficient business to fill its production facilities located in the Midwest. At the time the decision was made to close the Jeffersonville plant, the Company's other plants in the Midwest (Chicago, Illinois; Louisville, Kentucky; Cincinnati, Ohio; Florence, Kentucky; Kansas City, Missouri and Vandalia, Illinois) had idle machines. Each of these plants, with the exception of Vandalia, had employees on layoff. Presently, the situation remains the same.
>
> As such, Jeffersonville's location was influential in the decision to close the plant because of freight costs, which are paid by the customer, and the desire of customers to establish supply relationship with and be supplied by plants located near their facilities that fill the packages we make. The Company chose to direct its existing business to these other plants which are more suitably located to serve our present base of customers.
>
> You were advised beginning in January, 1989, of the possibility that Jeffersonville would not continue to operate. Through our discussions in 1989, you were advised that concessions were necessary in regard to labor costs and certain contractual language in order to make the Jeffersonville plant more competitive, and to be able to offset part of the location disadvantage. Throughout this time, however, you were also advised that even if the Company were granted the concessions it had requested, the Company could not guarantee that Jeffersonville would remain open. The decision to close Jeffersonville did not turn upon labor costs. Had the concession been granted, the decision to close Jeffersonville would not be different, given current business conditions. Simply, there is inadequate business in the Midwest to support Jeffersonville's continued operation.
>
> The decision to close the plant was made August 27, 1989 by the senior management of O-I Brockway Plastics Products, Inc. after careful consideration and review of the business available to the Company. The review of its business began June, 1988. The decision did not involve action by or discussion with the Board of

[5] Tr. 148, L. 2, is corrected to change ''without it not'' to ''we.''

> Directors and was not made by the Board of Directors. There is no agenda, there are no minutes and there is no analysis, research or report as requested by your demands No. 3 and 12. If there were, any such document would be considered confidential. The decision does not turn on labor costs. The decision does not turn on the content of the last contract negotiations for contract. The individuals who bargained with you for the existing labor contract did not participate in making the decision to close Jeffersonville.

Boles closed the letter by offering to meet and bargain about the effects of Respondent's decision to close the Jeffersonville plant.

On September 26, Peterson sent Boles a list of 13 additional questions stating that the information was necessary for the purposes of bargaining about the decision and its effects and necessary for the purpose of processing a grievance which the Union had filed.[6] Boles replied by letter dated October 10 which attached a series of answers to the September 26 questions. The cover letter concludes:

> Please also refer to my letter to you of September 19, 1989. As we have discussed, the Company does not believe that the decision to close the Jeffersonville plant is a mandatory subject of bargaining.

In the answers, Boles states that the product line at Jeffersonville had not been increasing over the preceding 5 years; that ''6–7 percent'' of the Jeffersonville product to be produced in the future at other locations would be produced at Louisville; no employees who are on layoff status at Louisville would be recalled because of the closing of Jeffersonville; production at Louisville of products formerly produced at Jeffersonville began on September 25, 1989; and there is ''essentially no difference'' in freight costs to customers for products produced in Louisville and Jeffersonville. Boles listed four accounts that had been transferred from Jeffersonville to Louisville; these four accounts constituted $596,000, or 4.8 percent, of a projected $12,190,000, over the next 12 months, in sales of products formerly produced in Jeffersonville—the remainder going to other plants owned by Owens-Illinois. The answers of October 10 also include the statement by Boles:

> The decision to close Jeffersonville was made August 27, 1989, by the senior management of O-I Brockway Plastic Products, Inc. The decision to transfer business to Louisville was made after that point in time by those individuals responsible for coordinating production scheduling with customer requirements.

Finally, Boles told the Union that there was no documentation that formed the basis of the decision to close the Jeffersonville plant, no documentation that formed the basis for the decision to move part of the production to Louisville, no internally generated communications with respect to the decisions, and, even if there were such documentation, it would not be furnished as Respondent considered such to be confidential.

Boles testified that production at the Jeffersonville plant ceased in early September, and the plant closed in late October, at which time there were 36 unit employees who were actively employed and 47 employees on layoff.

The Jeffersonville plant had operated with 10 blow-mold (as opposed to injection mold) machines to make plastic bottles out of a polyvinylchloride (PVC) compound. Of the 10 machines, 4 were sent to the Louisville plant, 2 to Respondent's Toledo research facility, 2 to Respondent's plant in Florence, Kentucky, and 2 to Respondent's Harrisonburg, Virginia plant. Jeffersonville Plant Manager Lilly and three other supervisors also transferred to Louisville on the closing of the Jeffersonville plant. After the shutdown of the Jeffersonville plant, orders that would have theretofore been filled there were filled at Respondent's plants at Louisville, Chicago, Vandalia, and Florence.

None other of Respondent's plants has been closed.

Respondent contends that the decision to close the Jeffersonville plant did not ''turn upon'' labor costs, as that phrase is used in cases discussed infra. In support of that contention, Respondent relies on the following testimony.

Boles testified that the decision to close the Jeffersonville plant was made ''several days'' before the August 29 announcement. Prior to that time, the Louisville plant had supplied the Colgate-Palmolive Company with PVC-based bottles in such quantities that the Colgate business made up 65 percent of the Louisville production. But in late August, Colgate told Respondent that it was going to convert to a type of container that would require another hydrocarbon base, PET. Neither the Louisville plant, nor any other of Respondent's plants, according to this record, could manufacture containers out of PET.

Leidy testified that he and a group of managers, including Trimble (who did not testify), made the decision to close the Jeffersonville plant on July 28. Leidy was asked and testified:

> Q. Okay. What then were all the factors, Mr. Leidy, that contributed to the recommendation—the decision to close down Jeffersonville?
>
> A. The overbearing [sic] issue was bottles to run. You know, what have you got that we can manufacture was the overbearing [sic] issue out of the thing. I mean—you can't keep a plant open if you've got nothing to run out of it. So we had an awful [lot] of costs sitting there with no way of absorbing, so you've got to reduce the capacity, and that was the only really logical thing to do.
>
> Q. Any other factors that you considered?
>
> A. Well, in the meantime also along with that, Colgate's coming back to it, and that they had made the conclusion that they were going from PVC into PET. So then—for surge capacity or anything of that, and then when they did that, we were going to have excess machines in Louisville when the transition occurred. We already had excess machines throughout our system and we could see with that that we were going to have them again, unless there was something done to go out and fill those machines, get orders.

[6] The grievance was under the preamble, as quoted above. In it the Union objected only to the failure of Respondent to apply the Jeffersonville contract to its Louisville plant (to which some of the production was to be transferred), and not to the decision to close the Jeffersonville plant.

Q. Now why wasn't Louisville taken down then if they were going to be in jeopardy as far as Colgate was concerned?

A. Louisville supplied, and has for many years, the Jeffersonville Colgate plant. It was the plant of choice and where we had run it for, I'm not sure how long. As long, for sure, as I've been involved with it, and beyond. They had the relationship, they had the knowledge of how to make it. We had also transferred some equipment in there such as an automatic case set-up machines from one of our Owens facilities to be able to set up cartons automatically, and there was no reason to transfer the business from one plant to the other, go through the learning curve in the new plant and then turn around and understand that we were losing the business anyway because it was going out of PVC.

Q. What's the status of the Colgate business today?

A. Well, we're running Colgate.

Q. In Louisville?

A. On our machines in Louisville. The Colgate people have ordered their machines. Where they're going to put them, I'm not sure because also in that was inhouse manufacturing, so they—and then where they locate those machines, it doesn't matter because we were told that we would not participate.

Q. Do you know when the Colgate business will completely dry up?

A. It will dry up in about September of this year—September of October [1990] is about our best guess.

On cross-examination Leidy acknowledged that Colgate's ''going from PVC into PET'' was the ''major customer conversions'' referred to in the August 29 plant closure announcement. Leidy's reference to the Louisville plant's supplying the Jeffersonville plant was an apparent reference to Jeffersonville's doing the ''overflow'' work of the Louisville plant, or production of work that Louisville could not, from time to time, handle. Respondent considered the Jeffersonville plant to be an ''overflow'' plant because it did such work regularly for various plants owned by Respondent.

Two memoranda that preceded the formal negotiations and the plant closing are relevant.

In a memorandum from Leidy to various company officials dated May 16, or after the informational sessions and before the formal negotiations, Leidy calls for a meeting of the officials to discuss Jeffersonville ''plant performance, present plant loading, potential plant loading, etc.'' The memorandum states:

The agenda will include:
1. Plant performance year-to-date
2. Present plant loading[7] and 60 day forecast
3. Business outlook for second half
4. If plant were to shut down

where would business operate and do we have capacity
can we service the business
profitability of relocated business versus Jeffersonville

5. Recommendation

shutdown or extend

6. Next steps

After the first four topics, initials of management staff members to lead the discussion were listed; after the last two, ''team'' was indicated. Also received in evidence were topic outlines of discussions at the meeting. Operating advantages and disadvantages of the Louisville, Vandalia, and Jeffersonville plants were listed. One paper entitled ''Continue to Operate Jeffersonville?'' lists as disadvantages of the Jeffersonville plant:

Location Relative to customers and other Plants
Unionized workforce with high wage rates and fringes
Restrictive contract language
Rebuild of Barkum in Louisville.

Leidy explained the reference to the unionized work force as:

Jeffersonville did have the highest average hourly rate in any plant that we had, and with their fringes and what have you, and then the seniority article with flexibility to move people around or out, the people that could do the job without having excess people was—the contract was very restricted [sic].

The reference ''Barkum'' was handwritten by Leidy. Leidy's testimonial explanation of this reference was somewhat convoluted, but it is clear from the testimony that the note was an indication that, as early as May 16, Leidy was contemplating removing an obsolete ''Barkum'' machine from Louisville and placing one or more of the Jeffersonville plant's machines there.

The paper concludes:

RECOMMENDATION

Continue to operate Jeffersonville at least through 1989
Reduce or eliminate contract disadvantage above
Evaluate PVC outlook—Colgate, Flammables, Environmental

About the reference to Colgate (the PVC contract served by Louisville), the direct examination of Leidy was:

Q. Now, how did the reference to Colgate pertain to Jeffersonville?

A. The reference to Colgate meant that if that went to PET, we had considerable excess capacity, excess machines in that area. More machines than we needed.

Q. Okay. So how would that affect Jeffersonville?

A. How would that affect Jeffersonville? Knowing that that may well happen, then what we would do is run the leftover business at Louisville, or what was left when that happened.

Another paper presented at the May 16 management meeting showed that the Jeffersonville plant was operating at a 17.6-percent gross profit for the year then to date.

Received in evidence was a June 23 memorandum from Boles to Frechette, Leidy, and other management entitled ''Jeffersonville Negotiations Update.'' It includes:

[7] ''Plant loading'' was defined by Leidy as the percentage of a plant's capacity used by one order.

> In light of our discussions with employees of the Jeffersonville plant, local union officials, and international union representatives over the past six months concerning an operation whose future is extremely uncertain without concessionary demands made by the Company being met, and given the extensive nature of the Union's list of demands, it goes without saying we are miles apart in reaching a settlement.

B. *Analysis and Conclusions*

The complaint alleges that, in violation of Section 8(a)(5) of the Act, Respondent refused to bargain with the Union regarding its decision to close the Jeffersonville plant. Respondent admits refusing to bargain about the matter. As its defenses, Respondent asserts that the decision to close the Jeffersonville plant was a managerial decision which is not a mandatory subject of bargaining; alternatively Respondent contends that, assuming that its actions involved a mandatory subject of bargaining, the 1983–1985 contract, as extended on July 18, vested it with the right unilaterally to close the plant.

In *Otis Elevator Co.*, 269 NLRB 891 (1984), the Board addressed the issue of whether there is a duty to bargain when a decision to close or transfer part of a business is based both on considerations involving the employment relationship and separate business considerations. In *Otis*, a management appraisal of employment costs prompted a review of operations which resulted in the transfer of a research function from one facility to another. The Board found that, although employment considerations prompted the review, the decision was based on purely business considerations (obsolescence and work duplication of the facility that was abandoned). The plurality opinion held (supra at 892):

> Despite the evident effect on employees, the critical factor to a determination whether the decision is subject to mandatory bargaining is the essence of the decision itself, i.e., whether it turns upon a change in the nature or direction of the business, or turns upon labor costs; *not* its effect on employees nor a union's ability to offer alternatives. [Emphasis in original.]

The Board found that the employer's decision did not turn on labor costs, and therefore dismissed the complaint.

Therefore, the primary issue is: Did the decision turn on labor costs? If so, the decision is a mandatory subject of bargaining, and an employer must secure agreement of the collective-bargaining representative, or bargain to impasse over the issue, before implementing its decision, unless, as Respondent contends, there is a waiver that precludes the necessity of such bargaining.

1. Mandatory subject of bargaining

In the August 29 announcement to the Union committee, Respondent cited as the reasons for the plant closing ''a general weakening of customer orders in the midwest coupled with the anticipation of major customer conversions to materials that will transfer significant orders to our competitors . . . .'' There was no evidence of ''a general weakening of customer orders in the midwest'' for Respondent or any of its competitors. Layoffs had occurred at most of Respondent's plants, including Jeffersonville, but there was no evidence that further layoffs were contemplated at the time. Also, Leidy admitted that the ''conversion'' referred to in the announcement was the PVC to PET conversion that Colgate had decided to make, a decision that would cost the Louisville plant 65 percent of its business. When asked on direct examination how the loss to the Louisville plant would affect the Jeffersonville plant, Leidy replied that ''what we would do is run the leftover business at Louisville, or what was left when that happened.'' Respondent repeatedly emphasized that the Jeffersonville plant was *only* an ''overflow'' plant since it had no primary contracts of its own. Therefore, Leidy's answer as to why Jeffersonville had to be closed when the Louisville plant lost the Colgate business was that Louisville was going to get Jeffersonville's overflow business when the Colgate business was lost. A better example of circular reasoning can hardly be imagined. At minimum, this reasoning provides no answer to the obvious question of why, if the Colgate contract would still have a year to run, as it did, the Jeffersonville plant was precipitously closed on the learning of the loss of the Colgate contract by Louisville. There is no evidence that the Louisville plant had lost any other business, and presumably there would still be overflow work to be done by Jeffersonville until October 1990, when the last Colgate contract is completed.

While, as Respondent argues, the future loss of the Colgate business by the Louisville plant would tend to exacerbate a condition of excess plant capacity, the issue immediately arises: Why was the Jeffersonville plant, and only the Jeffersonville plant, chosen to be closed? Leidy testified that Jeffersonville was remote from any of its customers and, since customers pay shipping costs, closing Jeffersonville and transferring business elsewhere would save the customer money; Louisville was not closed because it still had a year's time left on its contract with Colgate, and Jeffersonville had no such contract, so Jeffersonville was closed instead of Louisville.

However, Leidy testified that the January meetings with the three groups of plant personnel were called because a competitor could manufacture and ship to a customer at less cost to the customer, even though the competitor was much further away from the purchaser than was the Jeffersonville plant.[8] This factor belies any argument that a reduction in transportation costs was the primary problem. Moreover, transferring some of the business to Louisville would not save customers any money, as Boles' October 10 letter to Peterson acknowledged, because the plants are only 15 miles apart. Finally, if the transfers of business to the other plants had lowered costs to customers, Respondent would have effectuated the transfers of business without going through the exercise of trying (for 7 months) to secure wage (and seniority) concessions from the Union.

Which is to say, the reasons cited for the closing of the Jeffersonville plant do not withstand scrutiny.

When false reasons are given for an action, logic compels the conclusion that the real reason lies elsewhere. Although in his announcement to the union committee, and in his testimony at trial, Leidy did not admit that labor costs were even a partial consideration in the decisional process, and although Boles twice stated in his October 10 letter to Peterson that

[8] In the industry, customers usually pay shipping costs.

the decision did not turn on labor costs, the evidence is that it did.

In *Reece Corp*., 294 NLRB 448 (1989), the employer operated one manufacturing plant in Waltham, Massachusetts, three others in the United States, and one other in Holland. During renewal negotiations at Waltham, it sought economic concessions from the union, contending that its direct labor costs were too high. The employer was unable to get any of the concessions it demanded, and signed a contract without them. Thereafter, expressing concern for the viability for the Waltham plant, the employer again sought union concessions, citing excess manufacturing capacity and a sharp decline in demand for the product. Again, no agreement was reached with the union. Without bargaining, the employer closed the Waltham plant and transferred the unit work, and about 57 percent of its machinery, to its other plants.

As here, the employer in *Reece* argued that the decision to close its plant was not a mandatory subject of bargaining and, alternatively, that the union had waived its right to bargain over the matter. The Board first noted that the decision to close the Waltham plant was not a decision to terminate the production involved, but a decision to transfer work to different plants where it would be done by other employees, and held that that the decision was a mandatory subject of bargaining under *First National Maintenance*[9] and *Otis*. In so doing, the Board reviewed the requests for concessions made by the employer, both before and after the contract was signed, and held that

> In light of its bargaining positions, however, it is unreasonable for the Respondent now to argue that the decision turned essentially on factors other than labor costs.

In a footnote, the Board specifically noted that the employer's concession demands were themselves effective admissions that concessions by the union might negate the necessity of a relocation of the unit work.

Unlike *Reece*, the Board in this case need not rely on constructive admissions, or even deduce, that there was a direct relationship between labor costs and plant closure. Respondent's representatives assiduously avoided saying, in haec verba, that the plant would close if the concessions were not granted, as Respondent strenuously points out. But such a categorical statement is not required to find that there was a causal relationship between the decision to close the Jeffersonville plant and the labor costs of that plant. Before, and at trial, Respondent's representatives made it clear that labor costs were the determining factor in the prognosis of the plant's vitality.

When asked why the management had decided, in January, to go to the plant and meet with the employees and the Union, Leidy answered that ''for some reason'' a competitor had been able to manufacture and ship at lower cost, even though the competitor was further away from Jeffersonville. That ''some reason'' was labor costs; there was simply no other reason for talking to the employees and the Union about the situation.[10] Then, as he admitted, when Leidy went to the plant to talk to the employees, he told them that ''there was that possibility'' that the plant would close, although he denied remembering ''the exact language'' of his statement.

In his January 5 letter requesting early negotiations, Boles expressly stated that ''viability of the Jeffersonville plant'' was the reason for management's request for discussions of wages and benefits.[11] Additionally, on direct and cross-examination, admitted that Respondent told the Union in the informational meetings that the concessions were necessary for the viability of the Jeffersonville plant.

Immediately thereafter, in the first ''informational'' session on January 10, and continuing through the penultimate ''formal'' session in July, Respondent demanded labor cost concessions while, at the same time, expressing concerns for the Jeffersonville plant's vitality. Respondent's representatives repeatedly referred to the Jeffersonville plant as the most costly in the Owens-Illinois system. This cost factor, the Union was repeatedly told, was the labor cost factor, and it was placing the Jeffersonville plant in a mortal state because of the ''competitive factor.

Frechette testified that the reason for the request for the early negotiation (''informational'') meetings was to tell the Union that the Jeffersonville plant was becoming ''noncompetitive.'' In the January 10 presentation, the Union was told that there was required:

> Revision in the wage rate schedule that will provide for *labor costs* that are more in line with the marketplace competition. [Emphasis added.]

Respondent necessarily lumped together its references to ''marketplace competition'' and ''labor costs'' to make it clear that competition was the problem and labor costs were the solution (and not some considerations of geography or the production capacity of other plants in the Midwest).

The Union was told in the ''confidential'' memorandum presented at the March 9 meeting that costs, meaning only labor costs, were the problem; that memorandum recited, in capitals and bold face, that the Jeffersonville plant was making only a 1-percent net profit because of ''current Jeffersonville costs'' and that Respondent had concluded that ''we cannot compete on this business.''

While Respondent's representatives never told the Union that the plant would stay open if the concessions were granted, only Frechette ventured to testify that he told the Union that other elements may be the determining factor. Frechette testified that, at the January 10 meeting, he told the Union that ''the rise and fall of the plant was going to depend upon the market structure and not upon the cost structure of the Jeffersonville plant.'' However, Peterson testified that Frechette told the Union that the Company ''could not compete in the market because of . . . the cost factor of the plant, what it cost to put the product out.'' If Frechette's testimony were true, there would have been no point in Respondent's requesting the meeting in the first place. The parties were there, and everybody knew they were there, to talk

[9] *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981).

[10] Leidy acknowledged that the work quality of the Jeffersonville plant was very high, and he told the employees so.

[11] On January 10, the Union answered that it agreed to listen because it was concerned about ''our welfare and job security.'' The letters of January 5 and 10 make it clear that the Union had reason to think, and did think, that it was being told that there was a direct relationship between the demanded concessions and the vitality of the plant. Respondent made no attempt to disabuse the Union of this impression.

about ''the cost factor of the plant, what it cost to put the product out''; and the ''cost'' factor they were there to talk about was the ''labor cost'' factor, the only one over which the Union had control. I credit Peterson.

Additionally, the clear thrust of the May 16 internal memoranda was that the peril to the plant was ''Unionized workforce with high wage and fringes . . . restrictive contract language,'' and not anything else. Indeed, one of the stated problems with closing the Jeffersonville plant was ''where would business operate and do we have capacity.''

Finally, the management's June 23 ''Jeffersonville Negotiations Update'' plainly stated that the Jeffersonville plant was ''an operation whose future is extremely uncertain without concessionary demands made by the Company being met.''

All of which is to say, Respondent's representatives believed, and they told the Union that they believed, that competition was a threat to the plant, and the threat could be alleviated by the reduction of labor costs, and only by the reduction of labor costs.

In this posture, as in *Reece*, it must be concluded that it is unreasonable to say, post hoc, that Respondent's decision turned essentially on factors other than labor costs. Therefore, there are no distinguishing factors between this case and *Reece*.

Accordingly, I find and conclude that the decision to close the Jeffersonville plant turned on labor costs and, therefore, was a mandatory subject of bargaining, and that Respondent had a duty to bargain over the decision, unless the Union waived its right to demand such bargaining.

2. Waiver

To be effective, a waiver of a statutory right must be ''clear and unmistakable.'' *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). Respondent's brief, page 35, quotes the preamble of the contract and argues:

> In addition, the Management Rights clause provides, in pertinent part, that the Respondent has the right to decrease operations at Jeffersonville and to relieve employees from duty because of lack of work. Read together, the [preamble] and the Management Rights clause establish that Respondent had the authority to make the decision to close the Jeffersonville plant and to transfer the work elsewhere. The only restriction on this right pertains to the conditions that will apply once the decision is made. The authority to make the decision, however, clearly remains with the Employer.

The preamble does nothing more than state that the contract will be applied to a new plant if one in the area is acquired. Moreover, the Board in *Reece* rejected an attempt to create such a right to close a plant and distribute the business, and the unit work, among other of an employer's plants. The Board noted that the management-rights clause before it did not ''addresses the situation in which production and equipment are not permanently discontinued or sold, but rather are transferred elsewhere.'' In the absence of language giving the employer the right to take such action, the Board, Member Johansen dissenting,[12] refused to find a ''clear and unmistakable'' waiver of the union's right to bargain, as required by *Metropolitan Edison*. There was no such management right in the contract between the parties here, either.

Respondent additionally argues that the Union's failure to object to a previous transfer of work (to Respondent's Cincinnati plant) establishes a permanent waiver of the Union's right to object to such transfers. Such an argument was specifically rejected in *Litton Systems*, 283 NLRB 973 (1987), enf. denied 868 F.2d 854 (6th Cir. 1989). Moreover, there is no evidence that, in the previous transfer, the Union was presented with a fait accompli, as here, and that there was no bargaining over the decision.

Therefore, as the management-rights clause on which Respondent relies also contains no explicit right to transfer the unit work to other plants and to close the Jeffersonville plant, and there is no other basis to find a clear and unmistakable waiver of the Union's right to bargain over Respondent's decision to close the Jeffersonville plant, I find and conclude that there was no such waiver.

Conclusion

I conclude, therefore, that by refusing to bargain collectively and in good faith with the Union concerning the decision to close the Jeffersonville plant, and to relocate unit work permanently to other of its plants, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

THE REMEDY

The usual remedy for failing to bargain about a decision to close a facility and transfer work elsewhere is an order to require the employer to restore the status quo ante, to bargain about the decision, and to reinstate and make whole the employees who lost jobs as a result of the unlawful conduct.[13] If, however, such an order would be unduly burdensome, restoration of the status quo ante will not be required.[14] Apparently, the administrative investigation satisfied General Counsel that this case falls in the latter category, as the complaint asks only the following remedy:

> Offer the Jeffersonville, Indiana, employees immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions at the other plants where the bargaining unit work has been relocated, with necessary traveling and moving expenses for them and their families and their household effects, without prejudice to their seniority or any other rights or privileges previously enjoyed, dismissing, if necessary, any persons hired after the closing of the Jeffersonville plant. If there are not a suffi-

[12] Member Johansen dissented because he found that the management-rights clause, coupled with a severance pay clause, constituted the relevant waiver. In that case, the management-rights clause was much broader than that here, and the severance pay clause had been invoked to provide over $1 million in pay to the unit employees.

[13] *Park-Ohio Industries*, 257 NLRB 413 (1981), enfd. 702 F.2d 624 (6th Cir. 1983).

[14] See *Fibreboard Corp. v. NLRB*, 379 U.S. 203, 215–216 (1964).

> cient number of jobs for all the employees to be offered reinstatement, the Respondent shall place the names of those for whom jobs are not available on a preferential list in the order of their seniority, and thereafter offer them reinstatement before other persons are hired. Employees offered reinstatement shall be allowed a reasonable period of time for accepting such offers. Also, Respondent shall make whole the Jeffersonville, Indiana, employees by paying them what they would have normally earned from the date[s] of their termination[s] to the date of the offer[s] of reinstatement or, for the employees who decide not to relocate, until the date[s] they secure substantially equivalent employment with other employers.

This remedy, as also requested in the brief (p. 19), essentially tracks the remedy ordered in *Reece*, where, unlike here, the issue of burden was litigated. Since the matter was not litigated, I can do no more than order the requested remedy.

Backpay shall be based on the earnings that employees normally would have received during the applicable period, less any net interim earnings, and shall be computed in the manner set forth in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest computed in the manner set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[15]

ORDER

The Respondent, Owens-Brockway Plastic Products, Inc., Jeffersonville, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively and in good faith with International Chemical Workers Union, AFL–CIO, Local No. 728 as the exclusive representative of its employees in the appropriate unit, as set forth below, concerning the decision to close the Jeffersonville, Indiana plant and to relocate work permanently to its other plants. The appropriate unit is:

> All production, maintenance, shipping and receiving employees employed at Respondent's Jeffersonville, Indiana facility, but excluding quality control employees, office clerical employees, guards, professional employees and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer the Jeffersonville plant unit employees immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, at the other plants where the bargaining unit work has been relocated, with necessary traveling and moving expenses for them and their families and their household effects, without prejudice to their seniority or any other rights or privileges previously enjoyed, dismissing, if necessary, any persons hired after the closing of the Jeffersonville plant. If there are not a sufficient number of jobs for all the employees to be offered reinstatement, the Respondent shall place the names of those for whom jobs are not available on a preferential list in the order of their seniority, and thereafter offer them reinstatement before other persons are hired. Employees offered reinstatement shall be allowed a reasonable period of time for accepting such offers.

(b) Make the Jeffersonville plant employees whole for any loss of earnings and other benefits suffered in the manner set forth in the remedy section of this decision.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Mail a copy of the attached notice marked ''Appendix''[16] to each of the Respondent's employees who were employed at the Jeffersonville plant in the appropriate unit who were terminated or laid off as a result of the plant closure and transfer of work. The copies, on forms provided by the Regional Director for Region 9, shall be mailed after being signed by Respondent's authorized representative.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[15] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[16] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain collectively and in good faith with International Chemical Workers Union, AFL–CIO, Local No. 728 as the exclusive representative of our employees in the appropriate unit, as set forth below, concerning the decision to close our Jeffersonville, Indiana plant and to relocate work permanently to our other plants. The appropriate unit is:

> All production, maintenance, shipping and receiving employees employed at our Jeffersonville, Indiana facility, but excluding quality control employees, office clerical employees, guards, professional employees and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer the Jeffersonville plant employees, who were employed in the above appropriate unit, immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, at the other plants where the bargaining unit work has been relocated with necessary traveling and moving expenses for them and their families and their household effects, without prejudice to their seniority or any other rights or privileges previously enjoyed, dismissing, if necessary, any persons hired after the closing of the Jeffersonville plant. If there are not a sufficient number of jobs for all the employees to be offered reinstatement, we shall place the names of those for whom jobs are not available on a preferential list in the order of their seniority at the Jeffersonville plant and thereafter offer them reinstatement before other persons are hired. Employees offered reinstatement shall be allowed a reasonable period of time for accepting such offers.

WE WILL make the Jeffersonville plant unit employees whole, with interest, for any loss of earnings and other benefits they have suffered.

OWENS-BROCKWAY PLASTIC PRODUCTS, INC.

David L. Ness, Esq., for the General Counsel.
R. Jeffrey Bixler, Esq., of Toledo, Ohio, with *Margaret J. Lockhart, Esq. (Cooper, Straub, Walinski & Cramer)*, of Toledo, Ohio, on brief, for the Respondent.
Alton D. Priddy, Esq., of Louisville, Kentucky, for the Charging Party.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

DAVID L. EVANS, Administrative Law Judge. The original administrative law judge's decision (ALJD) in this case issued on June 15, 1990. The Respondent filed exceptions and a supporting brief.

On June 14, 1991, while the ALJD was pending review, the National Labor Relations Board (the Board) issued *Dubuque Packing Co.*,[1] in which it announced a new test for analyzing whether an employer's decision to relocate unit work is a mandatory subject of bargaining. The issue addressed by the Board in *Dubuque* is also raised in the instant proceeding. Accordingly, on September 30, 1991, the Board afforded the parties an opportunity to submit statements of position on this issue in light of the Board's decision in *Dubuque*.

In its position statement, the Respondent requested the opportunity, in light of the new standard established in *Dubuque*, to establish that the Union could not have offered concessions that would have changed the decision to relocate the unit work.

By Order dated December 31, 1991, the Board granted Respondent's request and remanded the proceeding to me ''for the limited purpose of receiving further evidence on the concession issue in light of *Dubuque*.''

A hearing pursuant to the Board's Order was conducted on March 16, 1992, at Louisville, Kentucky. At the remand hearing Respondent adduced the testimony of Dale W. Leidy, director of manufacturing and engineering for the plastic products division of Respondent. Leidy testified, in general and conclusionary terms, that market considerations would have made it impossible for Respondent to act any differently than it did (as described in the ALJD).

On the concession issue involved here, the Board's decision in *Dubuque* offers little guidance regarding what evidence might rebut General Counsel's prima facie case. However, the law assuredly requires more than the bare testimony of a witness such as Leidy. This is especially true where such ''evidence,'' and more, has already been found to be false and misleading, as it was in the ALJD.

Accordingly, I adhere to my original decision and recommended Order.

[1] 303 NLRB 386.